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Supreme Court of the United States

OCTOBER TERM, 1931

No. 263

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Petitioner,

against

CLARENCE BEZUE,

Respondent.

PETITIONER'S BRIEF

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against

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BRIEF ON BEHALF OF THE PETITIONER, THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

I

The Opinions of the Courts Below

The opinion, including the dissenting opinion, in the Court of Appeals is reported in *Bezue* v. *The New York, New Haven and Hartford Railroad Company,* 256 N. Y. 427, decided June 2, 1931 (R., 489-495).

The memorandum decision of the Appellate Division, Second Department, is reported in 232 N. Y. App. Div. 840 (R., 487).

The trial court wrote no opinion (R., 482).

II

Jurisdiction of this Court

This Court granted petitioner's application for writ of certiorari on October 19th, 1931 (R., 503).

III

Statement of the Case

This is an action for personal injuries brought under the Federal Employers' Liability Act (Act of Cong. April 22, 1908, c. 149, §1, 35 Stat. 65, and Act of April 5, 1910, c. 143, §1, 36 Stat. 291). The issues came on for trial before a Judge and a jury in the Supreme Court, Putnam County, New York, in September and October, 1930, and resulted in a verdict in favor of the plaintiff and against the defendant for $60,000 (R., 1, 352-355). The Appellate Division of the Supreme Court, Second Department, reversed the judgment and order upon the law and the facts and granted a new trial, unless plaintiff stipulated to reduce the verdict to the sum of $50,000, otherwise the judgment as modified and the order were unanimously affirmed. 232 N. Y. App. Div. 840. Plaintiff so stipulated (R., 1, 486). Thereafter petitioner appealed as of right to the Court of Appeals from the judgment in favor of the plaintiff, and also from the order of the Appellate Division modifying and reducing the judgment (R., 483, 484). The Court of Appeals affirmed the said judgment, and made a judgment and order of affirmance dated June the 3rd, 1931 (R., 495, 496).

Respondent (plaintiff below) was injured September 2, 1929, at Maybrook, New York, while in the employ of the

petitioner (defendant below). He was assisting to move a pair of main driving wheels belonging to engine 3221 and was thrown over the journal of the wheels when a block was removed and they rolled backward.

He went on duty at eight o'clock in the morning and the accident happened about 11:30 (R., 110).

The majority opinion of the Court of Appeals said that respondent was engaged in a plant service, and it did not matter "that at the moment of injury an employee was temporarily at work on a locomotive or some other instrumentality not engaged at the time in interstate commerce". (R., 491). Because in character the roundhouse was an essential instrumentality of interstate commerce, his plant service was also of this character, according to Judge Hubbs.

The dissenting opinion by Judge O'Brien, concurred in by Judge Kellogg, says in effect that the locomotive was withdrawn from commerce, that the character of respondent's employment on other occasions is immaterial. "His energies were directed toward an object which was not an instrument of commerce" (R., 495).

The majority opinion of the Court of Appeals seems to be based partly upon fear of an unsatisfactory result to the employee if any other conclusion is reached. In *Barlow* v. *Lehigh Valley R. R. Co.*, 214 N. Y. 116 (reversed in 244 U. S. 183), the anomalous situation was recognized but legislation was considered the only possible remedy (p. 121). Different rights at different times is a familiar consequence but hardly a reason for a special conclusion. See *Nogueira* v. *N. Y., N. H. & H. R. R. Co.*, 281 U. S. 128, 137.

The trial court, adopting another theory, upon the authority of *Law* v. *Illinois Cent. R. Co.*, 208 Fed. 869 (C C. A. 6th, 1913) held that plaintiff was engaged in interstate commerce because the engine was not withdrawn from service, but the difficulty with the *Law* case is the failure of the Circuit Court of Appeals to give consideration to time required for repairs (p. 872), which is contrary to the views of this Court in *Industrial Commission* v. *Davis*, 259 U. S. 182. In the latter the District Court of California, relying upon the *Law* case, was reversed. In *Chicago, K. & S. Ry. Co. v. Kindlesparker*, 234 Fed. 1, the Circuit Court of Appeals, relying upon the *Law* case, was overruled by this Court. 246 U. S. 657.

The sole fundamental question presented is whether the respondent "was engaged in interstate transportation or in work so closely related to such transportation as to be practically a part of it." Chicago & North Western Ry. Co. v. Bolle, decided by this Court on November 23, 1931.

Respondent's particular work

Two hours or more before he was injured, early in the morning, respondent's foreman told him to help move a main pair of driving wheels of engine 3221, then in the lathe in the Whiting Hoist building. With his truck he removed a heavy block from the lathe, and then assisted in rolling the wheels from the building to a switch, a distance of 619 feet, and from the switch to the place of the accident, 1062 feet (R., 135-139, 111-117, 257, 258).

These very heavy main driving wheels, from engine 3221, without which it could not run, had been taken to

this back shop or Whiting Hoist building and repaired (R., 112, 133-136, 219, 220, 262). They are indicated by an X on Defendant's Ex. P (R., 480, 271, 272). See also Defendant's Exs. N and O (R., 476, 268, 269; and 478, 269, 270, respectively).

The wheels were rolled from the Whiting Hoist building upon the turntable, in front of the roundhouse, then off and placed on track No. 17. Engine 3221 was pulled by another engine upon the table so the wheels could be placed in the pit of the track and applied to the engine (R., 113, 115, 278, 322, 330, 332).

While the men waited for the signal to move the wheels forward out on the turntable again they started rolling backward, resulting in the accident to the respondent (R., 111-117). If the accident had not happened they would have been put on the turntable, the turntable lined up with the track, and the wheels moved off (R., 115). The following morning they were to go under the engine, but respondent had nothing to do with the placement of them on the engine (R., 258). In fact, respondent never assisted in the actual applying of wheels to an engine (R., 146). So we see he is removed still farther from transportation, having nothing to do with the operation of 3221 or with any work incident thereto. Although he had not often assisted in this kind of work it belonged to the job of the unskilled labor force (R., 142, 261).

Part of the repairs of the engine could have been done on only four out of twenty-seven tracks, and in two out of the three sections of the roundhouse, because the other tracks were not equipped with a drop pit (R., 131, 132, 205, 206, 257, 262). This physical limitation, aside from all

other considerations, serves to particularize and separate the job at hand.

His acts in reference to the engine had no more relation to transportation than those of the machinist, for instance, who spent eight to ten hours turning the journal (R., 265, 266). He faced no casual labor for with his own helper (R., 118, 193), the removal from the lathe and the rolling of the wheels required some 5 to 10 men (R., 139, 159-161, 163, 278, 279, 330, 331). This was not one of the "small jobs" respondent had early described (R., 111), but a big job in time consumed, number of men involved, exertion applied.

Neither the acts of service performed by the respondent nor the instrumentality under repair possessed the character of interstate transportation within the purview of the cases cited under Point A.

Engine 3221 was withdrawn from service

Engine 3221 did not have a designated run (this appears from an examination of Plaintiff's Ex. 15-B covering the period August 10th to 23rd, 1929, and Plaintiff's Ex. 15-A covering the period September 4th to September 18th, 1929 [R., 397-422, 367-395, 210-212, 226-234, 243, 244]). During both these periods it had been engaged in interstate commerce, and also, *when in use,* from September 3rd, 1928, to August 9th, 1929 (R., 224, 225).

It is also true that for the period September 3rd, 1927, to September 3rd, 1928, this engine 3221, *when in actual use* by the petitioner, and when operating in and out of

Maybrook, New York, or in the Maybrook Yard, New York, was engaged in interstate commerce, although the record does not disclose whether during this last named period it had been used on any other division (R., 225, 226).

Engine 3221 arrived at Maybrook on August 23rd, 1929, the accident occurred September 2nd, and it left on September 4th,—a period of twelve days.

Defendant's Ex. I (R., 458-460) is an abstract of the inbound inspector's report, engineers' report, and house inspectors' report. The first two sheets contain thirty-eight items, and the third sheet sixteen additional items (R., 221, 222, 184-186, 247, 263, 189, 203-205). "Yes" on these three pages means that the job was completed (R., 246).

Defendant's Ex. J. (R., 464-468) shows what it was necessary to do to accomplish the major items as reported (R., 222-224). Repairs held for the thirty-day period could not be handled between runs (R., 263).

During those twelve days at Maybrook the main driving wheels of this engine were removed to the back shop, the journal or axle turned, the latter task involving eight to ten hours of labor, several parts of the engine were taken to the machine shop, the fire dumped, the jacket over the fire-box taken off, the boiler of the engine washed, and various other jobs attended to as appears from Defendant's Ex. I (R., 458-460, 179, 219-221, 253, 254, 266).

To repair 417 leaking bolts would take two skilled men five days (Item 8, p. 3, Defendant's Ex. I, R., 458-460, 249, 250). To renew certain bushings would take two men

thirty-two hours (Items 26-35, p. 2, Defendant's Ex. I, R., 458-460, 252, 253). As a matter of fact skilled labor was performed on all days of the period excepting August 24th and 25th (R., 260, 261). Of course, with the main driving wheels off the engine could not move under its own power (R., 262); just before the accident was pulled by another engine (R., 330).

In one part of the opinion by Judge Hubbs of the Court of Appeals it seems to be assumed that the instrumentality was not engaged at the time in interstate commerce, although the court deemed it unnecessary to determine this, and certainly the dissenting opinion of Judge O'Brien argues that the engine was withdrawn from service, was "a useless thing, incapable of allocation to commerce of any kind." It, therefore, seems to be the opinion of the Court of Appeals that the equipment involved was out of service, and when we consider the fact situation, the character of engine 3221 at the time of the accident—the nature of the repairs, the time consumed in making them, the several places of repairs, the condition of the engine at the time of the accident—we think there can be little doubt of its complete withdrawal from transportation of any kind.

Admittedly this engine was undergoing a boiler wash and inspection, in accordance with the Act of June the 7th, 1924, c. 355, §2, 43 Stat. 659, providing against "use" when not in "proper condition." This boiler wash always afforded opportunity to make many additional repairs, all in this case between August 23rd and September the 4th (R., 209, 253). Repairs during a mere layover between runs were one thing, repairs requiring a longer time were quite another, and, when possible, held for the boiler wash period (R., 263).

The railroad buildings at Maybrook, New York

The traffic handled at Maybrook came from the Lehigh & Hudson, the Ontario & Western, the Erie, the Lehigh and New England, besides petitioner's own road (R., 206, 207). Some of the foreign engines were repaired there (R., 231). Jennings was aptly called the general foreman at the Maybrook engine house *terminal* (R., 226).

The roundhouse or engine-house had three subdivisions with twenty-seven tracks, and a turntable in front (Defendant's Ex. C; R., 450; 131, 132, 205, 206, 257), and four tracks with drop pits (R., 262).

To the right of the roundhouse was a machine shop, containing a room about 70 feet long and 40 feet wide, with very considerable machinery in it (Defendant's Ex. L; R., 472; 268, 333).

To the right of the machine shop was a small building used for a carpenter shop and other purposes (Defendant's Ex. J; R., 462, 256, 257).

To the right of this small building was the so-called Whiting Hoist building, about 100x93 feet, showing at the extreme right of Defendant's Ex. J (R., 462; 257, 219, 255, 256). Here were four tracks, two with pits, and a Whiting Hoist having a capacity of 400 tons, used for raising engines over driving wheels. In the interior were a lathe that held driving wheels, and another lathe for electric welding. This building also had a tool room and electrical shop (R., 255, 256).

The main pair of driving wheels of engine 3221 had been

taken to this building, and the journal turned (R., 254). (Lathe in room shown in Defendant's Ex. D; R., 452, 254.) Some of the side rods and other parts of engine 3221 were taken to the machine shop room, which we have described, and some of the work on the engine was done there (R., 219, 334).

The tracks leading to the Whiting Hoist building, including the tracks on which the wheels were rolled on the day of the accident, are shown in Defendant's Ex. K (R., 470; 267, 268. Also Defendant's Ex. L; R., 472; 268). The tracks leading into the roundhouse, including track 17 on which the accident occurred, are shown in Defendant's Ex. M (R., 474, 268). The trucks ran along concrete floors from the roundhouse to the various buildings (R., 215, 216).

It is obvious that this Maybrook Terminal, with its buildings and equipment, was not merely a place of layover for engines. Even the so-called roundhouse alone was a place of repair over the drop pits, and the plant also included a machine shop, carpenter shop, and back shop or Whiting Hoist building, with skilled and unskilled forces of labor there to the number of about 203 (R., 333). The trial court recognized the relevancy of this line of proof of surrounding conditions (R., 255).

Engine repairs generally at Maybrook Terminal

While most of the engines at the Maybrook Terminal were engaged in interstate commerce when in use, some of them operated within the State of New York (R., 217, 229). Of course, this becomes immaterial in the event such engines were withdrawn at various times from all commerce for purpose of repair. The evidence would seem

to divide repairs into three classes—minor repairs that could be made between runs, repairs taking a longer time that could not be made between runs and were attended to at the boiler wash and inspection period, and classified repairs made after the engine had gone approximately 35,000 miles, or about every eighteen months. These last repairs were made at Readville, Massachusetts (R., 264, 189, 224). All engines operating in New York underwent a boiler wash every thirty days, and also a thirty day inspection (R., 209). To say the engine was not withdrawn from service is to say that only once every eighteen months such an engine was withdrawn when undergoing a complete dismantling at Readville.

Respondent's work on other occasions

Respondent had been in the employ of petitioner for nearly a year, at Maybrook, working six days a week (R., 105, 129). For the first eight or nine months he was a wiper of outgoing engines, sometimes in the roundhouse, sometimes outside (R., 106, 129, 130). At the time of the accident he was classified as a truck operator, under the labor foreman, in the unskilled labor gang. He had no engines and no jobs generally assigned to him, being called upon to do whatever work was required. For instance, whenever the men working on the engines needed a truck they would call for him (R., 107, 146). Respondent reported to Hessberger, his foreman (R., 135). Defendant's Ex. A (R., 448) shows the kind of truck he operated—an electric crane for picking up and moving objects (R., 131, 142-148).

With the truck used for various purposes, he would lift castings, bring material to the engines, such as grease, pull

down grease cups, assist in the adjustment of couplers on locomotives, fix brake shoes and pressure tanks, take drive shafts (but never driving wheels) off hot locomotives to the machine shop, carry driving rods on the truck, remove and replace engine pumps, assist in removing and replacing cylinder heads on engines, in moving side and main rods of engines to the cleaning vat and to the machine shop, and from the machine shop back to the engines, assist in removing and replacing drawbars between engines and tenders, at times handling heavy material. (For details see R., 106-109, 142-149, 183, 215-219, 261.) He had to do with all the engines (R., 107).

There were usually two electric trucks at the terminal, and respondent almost always used one of them (R., 108, 216). but the unskilled labor gang, to which respondent belonged, also cleaned up around the property, handled wheels, cleaned windows, operated coal pockets, dumped coal, ran the turntable (R., 261).

On the day in question respondent was the only operator on duty, so all heavy moving and lifting must have been done by him (R., 149).

From this description of his duties we see respondent engaged mostly with a truck, very often carting heavy material, at times concerned with engines withdrawn from service, at other times concerned with engines not so withdrawn. When working without a truck it is clear that he might well have no relation to transportation, as for instance, when he cleaned windows. Sometimes, "what he produced was not used or intended to be used, directly or indirectly, in the transportation of anything." *Chicago & North Western Ry. Co.* v. *Bolle, supra.* Furthermore, it

expressly appears that he had no general assignment to give character to his work as a whole.

Respondent went on duty about 8 o'clock in the morning, the accident happened about 11:30. He did some work with the truck, but the only definite testimony as to the day in question is that for two hours or more prior to the accident he was engaged solely with the main pair of driving wheels of engine 3221, and he did not know, upon the completion of this particular work, what he would next do (R., 145), although it turned out that he assisted to lift a pump rack up in position on an engine, and that is all we have (R., 119).

IV

Specification of Errors

(1) The Trial Court erred in denying petitioner's motion, made at the end of plaintiff's case, to dismiss the complaint on the ground that he had failed to prove interstate commerce, had failed to prove that he came under the Federal Employers' Liability Act at the time and place of the accident, that the evidence showed he was not engaged in such commerce at such time and place, that the engine had been withdrawn from service, that he was engaged in repair work with that engine at that time, that he was not engaged in commerce or movement in any way (R., 244, 245).

(2) The Trial Court erred in finding and holding that the engine was an instrumentality of interstate commerce, that it was not withdrawn from the service, but that roundhouse repairs were being made, and that during that time

it continued in the service and was an instrumentality of interstate commerce, and the plaintiff at the time was engaged in interstate commerce work upon an instrumentality of interstate commerce that had not been permanently withdrawn from the service (R., 245).

(3) The Trial Court erred in denying petitioner's motion for the direction of a verdict in its favor, made at the end of the entire case, on the ground of failure of proof that plaintiff was engaged in interstate commerce (R., 338, 339).

(4) The Trial Court erred in denying defendant's motion to go to the jury on the question of interstate commerce (R., 338).

(5) The Trial Court erred in its charge to the jury wherein it said that the plaintiff and defendant, as a matter of law, were engaged in interstate commerce, and plaintiff was entitled to the benefit of the Federal Employers' Liability Act (R., 340).

(6) The Trial Court erred in denying defendant's motion to set aside the verdict and for a new trial upon the exceptions in the judge's minutes, that the verdict was contrary to the evidence, contrary to the law, and on the further ground of the exceptions taken to the ruling on the question of interstate commerce (R., 354, 355).

(7) The Court of Appeals erred in holding that plaintiff was engaged in interstate commerce.

V

ARGUMENT

Summary of Argument

POINT A

THE PARTICULAR SERVICE PERFORMED BY RESPONDENT AT THE TIME OF HIS INJURY WAS REPAIR OF A LOCOMOTIVE WITHDRAWN FROM TRANSPORTATION SO THAT NEITHER THE INSTRUMENTALITY NOR THE CHARACTER OF THE WORK COULD BE INTERSTATE.

POINT B

THE CHARACTER OF THE WORK WHICH RESPONDENT DID AT OTHER TIMES IS IMMATERIAL.

POINT C

AT THE MOST RESPONDENT PRESENTED A FACT QUESTION WHICH SHOULD HAVE BEEN SUBMITTED TO THE JURY.

POINT A

The particular service performed by respondent at the time of his injury was repair of a locomotive withdrawn from transportation so that neither the instrumentality nor the character of the work could be interstate.

As we have said the Court of Appeals treated the repair of a particular engine as immaterial. We think this was error, for while the task or service will not be split into particular acts, on the other hand, the immediate task, the group of acts of service with a unity of purpose, separate and distinct from other groups with other purposes, is determinative.

In *Minneapolis & St. Louis R. R. Co.* v. *Winters*, 242 U. S. 353, the engine was withdrawn for only three days. Both before and after the accident it was engaged in mixed commerce. "An engine as such is not permanently devoted to any kind of traffic * * *" (p. 356). The character of the engine depends upon its employment at the time (p. 357). Please see also opinion of Justice McKenna in *Erie R. R. Co.* v. *Collins*, 253 U. S. 77, at p. 84. A failure to show the character of the rolling stock results in disaster. *B. & O. R. R. Co.* v. *Branson*, 242 U. S. 623. This is because rolling stock "is not permanently devoted to any kind of traffic." The time of withdrawal from use is material on the question of separation from movements that constitute transportation, and the separation gives character to the employment as not being in commerce if not immediate to it. *Chicago, K. & S. Ry. Co.* v. *Kindlesparker, supra.*

Some doubt existed as to the character of an engine exclusively devoted to interstate commerce until the decision of this Court in *Industrial Commission* v. *Davis, supra,* where it was assumed that the engine was sent from exclusive employment in interstate commerce to the repair shops, and after the repairs were finished the engine was finally put into the same kind of service. Notwithstanding this exclusiveness, when the equipment is out of use, withdrawn for repairs, when the duration of withdrawal is for several days at least, when there is a withdrawal from service and placement in new relations, then it cannot be said that such equipment partakes of the character of interstate transportation. It follows, therefore, that persons employed upon such equipment are not employed in interstate transportation. This we take it is the holding of *Industrial Commission* v. *Davis, supra.*

Engine 3221 was out of service for twelve days. Part of it was in the roundhouse, part in the Whiting Hoist building, and part in the machine shop. The fire was dumped, and during this time it was "a useless thing, incapable of allocation to commerce of any kind." (Dissenting opinion of Judge O'Brien in the Court of Appeals in the case at bar). When we also take into consideration the nature and extent of the repairs during the period of withdrawal we are forced to the conclusion that neither the character of the instrumentality nor the character of the employment was immediate to transportation.

This case does not involve a car waiting to make a trip outside of the State (*Johnson* v. *Southern Pacific Co.,* 196 U. S. 1); or engaging in a move preliminary to such a trip (*Norfolk & Western Ry.* v. *Earnest,* 229 U. S. 114; *Grand Trunk Ry. Co.* v. *Lindsay,* 233 U. S. 42; *Phila. & Read. Ry.*

Co. v. *Hancock*, 253 U. S. 284). Respondent's employment was not an act of preparation in the sense contemplated in *Nor. Car. R. R. Co.* v. *Zachary*, 232 U. S. 248. It was not an engine on which running repairs were being made, not withdrawn from service but delayed (*Walsh* v. *N. Y., N. H. & H. R. R. Co.*, 223 U. S. 1, commented on in *New York Cent. R. Co.* v. *Marcone*, 281 U. S. 345, 350; *Great Northern Ry.* v. *Otos*, 239 U. S. 349; *Erie R. R. Co.* v. *Szary*, 253 U. S. 86; *New York Cent. R. Co.* v. *Marcone*, *supra*, at p. 350). Certainly the locomotive was not actually running between States (*Seaboard Air Line* v. *Moore*, 228 U. S. 433).

It was not the completion of an interstate trip (*B. & O. S. W. R. R.* v. *Burtch*, 263 U. S. 540). It was not taking an engine from one State to another for purpose of repair. *Chicago, Rock Island Ry.* v. *Wright*, 239 U. S. 548. It was not a mere interruption of movement. The service does not so closely relate to interstate transportation as to be practically a part of it. *Del., Lack. & West. R. R.* v. *Yurkonis*, 238 U. S. 439. It was not repairing or keeping in usable condition an instrumentality then in use in any commerce. *Shanks* v. *Del., Lack. & West. R. R.*, 239 U. S. 556, 559, 560; *Ill. C. R. Co.* v. *Cousins*, 241 U. S. 641. We fail to find any direct relation to interstate transportation. One interstate movement had terminated, another had not yet begun. The employment was too distant to be a part of or to have close or direct relation to interstate transportation. *Chi., Burlington & Q. R. R.* v. *Harrington*, 241 U. S. 177; *New York Central R. R. Co.* v. *White*, 243 U. S. 188, 192; *Lehigh Valley R. R. Co.* v. *Barlow*, 244 U. S. 183.

Regardless of the kind of facility it is always necessary to show "use" in interstate transportation. In dealing with repair of tracks or bridges we have a permanent de-

votion which satisfies the test except in construction cases like *New York Central R. R. Co.* v. *White, supra.* In dealing with rolling stock, on the other hand, the determination of "use" involves elements of time, nature and extent of labor, place of repair, separation from such transportation. *Erie R. R. Co.* v. *Collins, supra,* involved work on pump house facilities; *Pedersen* v. *Del., Lack. & West. R. R.,* 229 U. S. 146, involved repair of a bridge; *New York Central R. R. Co.* v. *Winfield,* 244 U. S. 147, was the case of a section laborer assisting in the repair of main line track; *New York Cent. R. R. Co.* v. *Porter,* 249 U. S. 168, was that of a laborer engaged shoveling snow between the track and the platform; *Phila. B. & W. R. R. Co.* v. *Smith,* 250 U. S. 101, was that of an employee assisting in the work of bridge carpenters; *Kinzell* v. *Chicago, M. & St. P. Ry. Co.,* 250 U. S. 130, was that of an employee engaged in spreading earth to keep a track open for traffic; *So. Pac. Co.* v. *Industrial Accident Comm.,* 251 U. S. 259, was that of a lineman engaged in wiping insulators supporting main wire in use at the time. Such cases are readily distinguishable because of the "repairing or keeping in usable condition a roadbed, bridge, engine, car or other instrument then in use in such transportation." *Shanks* v. *Del., Lack. & West. R. R., supra,* at p. 560.

POINT B

The character of the work which respondent did at other times is immaterial.

Whether we look at the character of the instrumentality or the particular service, or the character of the general work, the old question presents itself for solution, whether

respondent was "engaged in interstate transportation or in work so closely related to such transportation as to be practically a part of it." *Chicago & North Western Ry. Co.* v. *Bolle, supra.* Notwithstanding this recent decision, because "a precise ruling, one that enables an instant and undisputed application, has not been attempted to be laid down," and because "we are brought to a consideration of degrees" (*Industrial Commission* v. *Davis, supra,* at pp. 185, 187), we here attempt a review of the law with special reference to the facts of our case to show that the character of the work he did at other times is immaterial.

The circumstance that respondent was engaged in interstate transportation on other occasions does not, in and of itself, make any difference as is clear from the opinion of Mr. Justice Sutherland in the *Bolle* case. This practical sense point of view in the interpretation of the Act, this confinement to particular service, runs through the decisions. In *St. Louis, San Francisco & Texas Ry.* v. *Seale,* 229 U. S. 156, a clerk went through a yard to mark the cars for the switching crew. Although his duties related to both kinds of traffic the opinion by Mr. Justice Van Devanter does not discuss his general work but relies solely upon the proof that the train in question was interstate and the transportation had not ended. In *Ill. Cent. R. R.* v. *Behrens,* 233 U. S. 473, a member of a switching crew, hauling a drag of intrastate cars, was held to be engaged in intrastate commerce, although his general work extended to both. In *Shanks* v. *Del., Lack. & West. R. R., supra,* Shanks was altering the location of a fixture in a machine shop. Mr. Justice Van Devanter said the usual work was immaterial (p. 558). In *Chicago, K. & S. Ry. Co.* v. *Kindlesparker, supra,* the plaintiff was a helper in the shops, at times acted as a fireman, but this Court concerned itself

only with his repair work on an engine at the time he suffered injury. Finally, in *Chicago & North Western Ry. Co.* v. *Bolle, supra,* respondent had supplied engines with coal and water, fired live engines, turned a turntable, but the character of this work was immaterial.

Congress did not legislate as to general work although it had good reasons for doing so (*Ill. Cent. R. R.* v. *Behrens, supra,* at p. 477). This, we take it, was back of the expression of Mr. Justice Brandeis in his dissenting opinion in *New York Central R. R. Co.* v. *Winfield, supra,* at p. 163.

Neither previous nor future employment is of any importance. *Ill. Cent. R. R. Co.* v. *Behrens, supra,* at p. 478; *Chi., Burlington & Q. R. R.* v. *Harrington, supra,* at pp. 179, 180; *Southern Railway Co.* v. *Puckett,* 244 U. S. 571, 574. Mere expectation of interstate work in the immediate future does not bring a case within the act. *Erie Railroad Company* v. *Welsh,* 242 U. S. 303; *Minneapolis & St. Louis R. R. Co.* v. *Winters, supra,* at p. 357. One separate and distinct service is not to be made an incident to or subordinate to another separate and distinct service. *Illinois Central R. R. Co.* v. *Peery,* 242 U. S. 292.

Respondent was performing a separate and distinct service, had been for two hours or more, in connection with an engine withdrawn from service. It was not like carrying material to a bridge to repair it (*Pedersen* v. *Del., Lack. & West. R. R., supra,* at p. 152), or taking an engine from a roundhouse to a track to haul an interstate train (*Norfolk & Western Ry.* v. *Earnest, supra*), or handling a car waiting to be moved in an interstate run (*Johnson* v. *Southern P. Co., supra*). Each was clearly a minor task essentially a part of a larger one.

The fact situation in the case at bar is obviously very different from that of *New York Central R. R.* v. *Carr*, 238 U. S. 260, where a brakeman placed two intrastate cars on a side-track so that the interstate train might proceed. The act was done to further the later work. In *Pennsylvania Company* v. *Donat*, 239 U. S. 50, it was necessary to remove two empty cars to complete an interstate movement. In *Southern Railway Co.* v. *Puckett, supra,* plaintiff assisted in raising a wrecked car to extricate an employee but for the immediate purpose of opening a way for interstate traffic. In *Louisville & Nashville R. R. Co.* v. *Parker*, 242 U. S. 13, a fireman moved an empty car to reach and move an interstate car. These references show how close the acts were to actual interstate transportation, and the interstate purpose.

So the work in *Kinzell* v. *Chicago, M. & St. P. Ry. Co., supra,* had the double purpose of spreading earth to widen an embankment and to keep the track open for traffic. So the service of a flagman at a public crossing concerns the safety of both commerces, and safety of track. *Phila. & Read. Ry. Co.* v. *Di Donato*, 256 U. S. 327. None of these cases departs very far from the clear situation in *Phila. & Read. Ry. Co.* v. *Polk*, 256 U. S. 332, where a member of a crew handled a draft of freight cars, some interstate, some intrastate.

Furthermore, to continue this same negative line of reasoning, the work respondent was doing at the time did not partake of the character of his work as a whole. It was more an incident of one part than another. Illustrations readily occur showing the difference—leaving the yard at the close of the day's work (*Erie R. R. Co.* v. *Winfield*, 244 U. S. 170); remaining on premises after completion of

work (*Erie R. R. Co.* v. *Szary, supra; New York Cent. R. Co.* v. *Marcone, supra,* at p. 350). In these cases we find merely incidents of interstate employment, intimate relation with it, interstate employment a necessary objective, possibly a temporary absence from usual place and kind of work. A mere change of physical position is not, of course, determinative (*Nor. Car. R. R. Co.* v. *Zachary, supra,* at p. 260). But in the case at bar we have a great deal more than that, and affirmative as distinguished from negative conduct.

POINT C

At the most respondent presented a fact question which should have been submitted to the jury.

The case may be considered from two angles:

1. Does the evidence fail to show respondent was engaged in interstate transportation when injured?

2. Does the evidence tend to show respondent was not engaged in interstate transportation?

If the evidence fails to sustain respondent's burden there can be no recovery as a matter of law. If the evidence even tends to show he was not so engaged then the question should have been given to the jury. We submit that we have shown a failure of proof and that, therefore, the trial court should not have ruled, as a matter of law, that respondent was engaged in interstate commerce.

But if different inferences can be drawn by reasonable men from the facts, even though the evidentiary facts are

not in controversy and the ultimate conclusion is a mixed finding of law and fact, then the issue is one for the jury.

Such treatment was approved by this Court in the following cases among others:

Seaboard Air Line v. *Moore, supra;*
Nor. Car. R. R. Co. v. *Zachary, supra;*
Penna. Co. v. *Donat, supra;*
Chi. & Rock Island R. R. v. *Devine,* 239 U. S. 52;
Seaboard Air Line v. *Koennecke,* 239 U. S. 352, 355;
Southern Railway v. *Lloyd,* 239 U. S. 496;
Pecos & Northern Ry. v. *Rosenbloom,* 240 U. S. 439;
Louisville & Nashville R. R. Co. v. *Parker, supra;*
New York Cent., etc. R. R. Co. v. *Tonsellito,* 244 U. S. 360.

CONCLUSION

The test is the particular service or task at the particular time. The word "service" refers to the immediate task at hand, and this Court has not hesitated to split up a day's work. This group of acts was separable from other groups by a long period of time and by definite, further, particular incidents of exertion. The character of his work at other times is immaterial.

To call respondent's work "plant service" adds nothing to the solution of the problem. At the time of his injury he did not act with reference to the maintenance, repair, or construction of the plant. His acts of service can be referred

only to a withdrawn engine. He had nothing to do with its operation, being far removed from that. Both the character of respondent's work at the time involved, and the character of the instrumentality upon which that work was performed force the conclusion that he was not engaged in interstate transportation or in work so closely related to it as to be practically a part of it.

We, therefore, respectfully submit that the judgment of the Court of Appeals of the State of New York should be reversed.

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APPENDIX A

Federal Employers' Liability Act.

Act of April 22, 1908, c. 149, §1, 35 Stat. 65; U. S. C. A. Title 45, c. 2, §51.

"LIABILITY OF COMMON CARRIERS BY RAILROAD, IN INTERSTATE OR FOREIGN COMMERCE, FOR INJURIES TO EMPLOYEES FROM NEGLIGENCE. Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States, or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury *while he is employed by such carrier in such commerce,* or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and; if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." (italics ours).

APPENDIX B

Act of June 7, 1924, c. 355, §2, 43 Stat. 659, 45 U. S. C. A. §23, reads as follows:

> "It shall be unlawful for any carrier to *use or permit to be used* on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30, and 32 and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for." (italics ours).